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Supreme Court of the United States

OCTOBER TERM, 19....

No. 642

SAMUEL J. ZUSMANN, SR., Trustee in Bankruptcy for WALTER R. THOMAS, ATHENS, INC., ET AL., Bankrupt,

Petitioner,

versus

NATIONAL ACCEPTANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

LIPSHUTZ, MACEY, ZUSMANN & SIKES,
By MORRIS W. MACEY,
64 Pryor Street, N.E.,
Atlanta, Ga.,
Counsel for Petitioner.

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UNITED STATES SUPREME COURT

OCTOBER TERM, 19....

No. .....

SAMUEL J. ZUSMANN, SR., Trustee in Bankruptcy for WALTER R. THOMAS, ATHENS, INC., ET AL., Bankrupt,

Petitioner,

versus

NATIONAL ACCEPTANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Samuel J. Zusmann, Sr., as Trustee in Bankruptcy of Walter R. Thomas, Athens, Inc., Walter R. Thomas, Inc., Walter R. Thomas & Associates, Inc., Myron E. Freeman & Brothers Co., Inc., and Atlanta Wholesale Jewelry Co., Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on June 23, 1967.

OPINIONS BELOW.

The opinion of the Referee in Bankruptcy, District Court for the Northern District of Georgia and the opinion on review of the District Court for the Northern District of Georgia are not reported. Copies thereof are appended to this petition in Appendix A & B at pp. 13 and 21. The opinion of the Court of Appeals for the Fifth Circuit was not reported at the time of writing this petition, but copies thereof are appended to this petition in Appendix C at p. 26.

JURISDICTION.

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on June 23, 1967, and copies thereof are appended to this petition in Appendix C at p. 33. The jurisdiction of this Court is invoked under 11 U.S.C. § 47C (Bankruptcy Act, §.24).

QUESTION PRESENTED.

The question presented is whether respondent, a secured creditor, may recover, in addition to its principal and interest in full, which amounts to approximately $380,000.00, the additional sum of $38,687.51 under the guise of attorney's fees simply because its promissory notes and security agreements contain provisions for such fees and because *Georgia Code 20-506* defines reasonable fees to be fifteen per cent of the first $500.00 and ten per cent of the excess of the obligation.

The allowance of $38,687.51 is not related to the value of the services rendered by the attorney, nor to the time spent on the case. It is arbitrarily allowed based on arithmatical computations set by the Georgia statute.

As the claim is proved as part of the creditor's claim and not as a separate claim of the attorney, there can be no assurance that the amount allowed reaches the attorney and it is possible that such an arbitrary award could result in a windfall to a creditor.

All that is required under the Georgia statute to be entitled to apply the statutory arithmatical formula is to give written notice of intention to collect such fee. In these cases, as in many bankruptcy proceedings, such a fee will consume a substantial portion of the assets to the detriment of taxing authorities and general creditors.

A further question is presented as to whether there was compliance with the Georgia statute since no written notice was ever given by counsel for respondent to the Receiver or Trustee.

Still a further question is whether the Circuit Court properly interpreted the provisions for attorney fees in the notes and security agreements as coming within the purview of the statute.

All of the questions, however, eventually resolve into whether a secured creditor can obtain from the

equity in the collateral he holds, after payment of his principal and interest, an additional amount based on a statutory formula, which might, as in these cases, preclude payment in full of tax claims and prevent any distribution whatsoever to unsecured creditors.

STATUTES INVOLVED.

Georgia Code 20-506, Georgia Code 28-405 and 11 U.S.C. § 11(a)(2) Bankruptcy Act Section 2a(2) as set forth in Appendix D at p. 35.

STATEMENT OF THE CASE.

All of the assets of these bankruptcy estates were encumbered by a security agreement of respondent. From the sale of these assets, sufficient funds were realized to pay respondent's principal and interest of approximately $380,000.00, which the Referee allowed. Additional funds were realized from the sale of these assets from which respondent claimed attorneys fees and respondent maintained that these attorneys fees were in the amount of $38,687.51 which is the amount obtained by taking 15% of the first $500 and 10% of the excess of principal and interest, which is the amount fixed by *Georgia Code 20-506* for reasonable attorneys fees. The Referee disallowed this amount and ruled that the Georgia Code established only a maximum attorney's fee and that the court had the equitable power to set a reasonable attorney's fee. The District Court affirmed the Referee and the Circuit Court of Appeals reversed asserting that the court was bound by the Georgia Code in setting the

attorney's fees for the respondent's attorney. The Circuit Court failed to consider as relevant the value of the services rendered by respondent's attorney, the amount of time expended by him on this case, and further, failed to take into account the fact that by allowing this windfall as attorney's fees that some of the taxes might go unpaid and that unsecured creditors would in all probability receive no dividends whatsoever.

The Circuit Court also ignored the fact that there was no compliance with the Georgia Code Section which states that written notice must be given to the party sought to be held for payment of the attorneys fees. In this case that party was the Receiver and subsequently the Trustee in Bankruptcy. No written notice was ever given to him. (R. 17.)

The Circuit Court also treated the respondent better in the bankruptcy court than respondent would have been treated in the Georgia Courts for in Georgia, once a Receivership action is filed, Georgia courts hold that the required statutory notice cannot be perfected. *Georgia Code 28-405.*

On April 8, 1964 Walter R. Thomas, Inc. and the other four interrelated corporations instituted proceedings under Chapter XI of the Bankruptcy Act. Petitioner was appointed Receiver of the corporations the following day; all corporations were adjudicated bankrupts on May 11, 1964, and petitioner was subsequently elected trustee.

In 1963 the corporations entered into financing agreements with respondent, executing promissory notes and security agreements, the pertinent provisions of which are:

Promissory Note.

If the holder hereof shall incur or pay. . . any attorney's fees by reason of the employment of counsel for advice, counsel or other legal services, . . . such . . .attorney's fees. . .shall be and is hereby made a further charge and lien upon the collateral pledged hereunder.

Chattel Mortgage Security Agreement.

If Mortgagee shall incur or pay any expenses . . .or attorney's fees by reason of the employment of counsel for counsel or advice with respect to this mortgage or the indebtedness secured hereby, . . . such expenses and reasonable attorney's fees. . . shall be and is hereby made a further charge and lien upon the mortgaged property.

On April 3, 1964 respondent declared the obligations in default and gave notice to the corporations of intention to collect attorney's fees, as provided by *Georgia Code 20-506*. Under this statute the debtor has ten days to pay the obligation without liability for the attorney's fees. The bankruptcy proceedings were filed before the ten day period had run. Although petitioner, as Receiver, was orally informed of the ten day notice, no written notice was given to petitioner, as prescribed by *Georgia Code 20-506*.

On appeal the five bankruptcy proceedings were consolidated and are so treated here.

The Circuit Court's decision creates an unconscionable result and is in conflict with the decisions of the Georgia Courts and of other Circuits. To allow respondents under the guise of attorneys fees $38,687.51 would be to pay their attorneys far more than they could expect to get in private litigation and would penalize the creditors of these estates.

Since just about all mortgages contain such an attorney's fee provision, such a decision would result in the puffing of all secured claims by an arbitrary percentage amount and create the inequitable result of windfalls for secured creditors and a further dilution of money available for unsecured creditors.

REASONS FOR GRANTING THE WRIT.

1. It is axiomatic that the bankruptcy court has the power to review fees for attorneys for petitioning creditors, bankrupts, Receivers, and Trustees. In reviewing these fees, the court is not bound by statistics or by any other arbitrary rules, *Jacobowitz v. Double Seven Corporation*, 378 F.2d 405 (9th Cir. 1967), but applies the usual fair standards. It would be repugnant to the principles of the bankruptcy act to apply a different standard for attorneys for secured creditors who appear in bankruptcy proceedings and to hold that their fees are determined by the provisions of a security agreement which alludes to

a state statute, thereby establishing immunity from judicial review. This is the effect of the decision of the Fifth Circuit; it decides an important point of bankruptcy law which has never before been decided by this court.

2. Attorneys fees for secured creditors should be determined by the usual standards, viz, time expended, skill employed, results accomplished, and the standing of the attorney at the bar. The court should have the authority to inquire into the reasonableness of such fees in bankruptcy, and not be precluded simply because of a state statute.

3. It would be a harsh and inequitable result to the unsecured creditors in a bankruptcy proceeding if secured creditors were permitted to tack on to their principal and interest an additional 15% on the first $500 and 10% on the balance of their debt under the guise of attorney's fees as provided by a state statute. Dividends would be diluted and secured creditors would receive a windfall available only in bankruptcy. In *Bank of Marin v. England*, 87 S.Ct. 274 (1966) the court held that to achieve an equitable and fair result the court would not read a statute "with the ease of a computer".

4. The Circuit Court misinterpreted *Security Mortgage Company v. Powers*, 278 U.S. 149, 74 L.Ed. 236 (1928). In *Security*, the issue presented was whether a secured creditor's claim for attorney's fees was a provable and allowable claim in a bankruptcy pro-

ceeding, and, if so, whether it would be accorded the same secured status as the principal claim. No issue was presented as to the method for determining the amount for which attorneys fees would be allowed. The Circuit Court believed that *Security* compelled it to apply *Georgia Code 20-506* in computing the amount of attorneys fees to the exclusion of all other considerations.

5. The holding of the Fifth Circuit is in conflict with the bankruptcy objective of equity in distribution of assets of bankruptcy estates. The power of judicial review of fees is essential to accomplish this objective. *Collier on Bankruptcy,* Vol. 3, ¶63.15, p. 1850. The decision is also in conflict with the holding of this Court, *Local Loan Co. v. Hunt,* 292 U.S. 234, 54 S.Ct. 695 (1934) that state statutes must yield where necessary to achieve equity in a bankruptcy proceeding. *11 U.S.C. § 11a (2).*

6. The decision of the Fifth Circuit is not limited in its applicability to administration of bankruptcy estates only in Georgia, but affects administration in every state in which parties may enforce a claim for attorney's fees. The decision affirms the validity of per cent provisions, regardless of their reasonable ness and removes all judicial review of such provisions.

7. The decision is in conflict with decisions of the Third and Eighth Circuits, *Mechanics American National Bank v. Coleman,* 204 Fed. 24 (8th Cir. 1913)

and *McCabe v. Patton*, 174 Fed. 217 (3rd Cir. 1909), holding that per cent provisions constitute only a maximum limit, and that the courts have the right to determine what is a reasonable fee in relation to the services rendered. The decision is also in conflict with a Tenth Circuit decision, *Webster Drilling Company v. Walker*, 286 F. 2d 114 (10th Cir. 1961) holding that a stipulated percent is at most a prima facie indication of the sum to be recovered, but if excessive or unreasonable should be reduced by the Court.

8. The decision of the Court below is in conflict with the *Security* decision. It held that provability of a claim for attorney's fees was dependent upon state law. Georgia law prohibits the ripening of a claim for attorney's fees after commencement of a receivership proceeding. *Georgia Code 28-405; Strickland v. Williams*, 215 Ga. 175, 109 S.E.2d 761 (1959). The analogy of a state receivership proceeding to a federal bankruptcy proceeding requires no elaboration. Further, the Georgia statute regarding attorneys' fees; *Georgia Code 20-506*, requires *written* notice to the party sought to be held, in this instance the bankruptcy estate. Failure to comply strictly with the statute requires disallowance of the claim. *Adair Realty & Loan Company v. Williams Brothers Lumber Co., et al.*, 112 Ga. App. 16, 143 S.E. 2d 577 (1965). In upholding the claim of respondent the Fifth Circuit departed from the holding in *Security*.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ or certiorari should be granted.

.....

MORRIS W. MACEY,
LIPSHUTZ, MACEY,
ZUSMANN & SIKES,
Attorneys for Petitioner.

CERTIFICATE OF SERVICE.

I, Morris W. Macey, of counsel for appellee in the above entitled action, hereby certify that on the .... day of ...., 1967, I served the attached petition for petitioner upon Harmon & Thackston, counsel for respondent, 1944 National Bank of Georgia Building, Atlanta, Georgia, by depositing a copy in the United States mail, postpaid and properly addressed to their offices.

....

MORRIS W. MACEY.

APPENDIX A.

Filed Nov. 3, 1955.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION.

Case Numbers 48380, 48381, 48382, 48383, 48384, In Bankruptcy.

IN THE MATTERS OF:
WALTER R. THOMAS, ATHENS, INC., WALTER R. THOMAS, INC., WALTER R. THOMAS & ASSOCIATES, INC., MYRON E. FREEMAN & BROTHERS CO., INC., ATLANTA WHOLESALE JEWELRY CO., INC.,

Bankrupts.

The question involved here is the method by which attorney's fees should be awarded to National Acceptance Company under the provisions of its security agreements with the bankrupt corporations. This legal question is all that is involved in this order; however the Court will begin by making certain findings of fact, which actually are not in dispute between the parties:

Finding of Fact.

On April 8, 1964, each of the above-named bankrupts instituted Chapter XI proceedings in the Court. On April 9, 1964, a receiver was appointed to take

charge of the property of bankrupts and to operate the businesses. Subsequently, each of the corporations was adjudicated bankrupt.

Prior to the commencement of these proceedings each of the corporations had entered into financing agreements with National Acceptance Company. When these proceedings commenced National Acceptance Company asserted various claims, which were disputed by the trustee. All of the disputes between National Acceptance Company and the trustee have been compromised and settled, pursuant to previous orders entered herein, with one exception: the right and extent to which attorney's fees should be allowed to National Acceptance Company under the provisions of its security agreements.

All of the security instruments involved have previously been introduced into evidence. There is no dispute that National Acceptance Company received legal services by its counsel in these proceedings. National Acceptance Company contends that it must receive attorney's fees as provided in Georgia Code, 20-506; the trustee asserts that the Court has the authority to determine what fees shall be allowed.

No evidence has been introduced as to the time or efforts expended by National Acceptance Company's counsel. The Court is not asked to determine an amount at this time but only to answer the foregoing legal question. Should the Court accept the legal theory of National Acceptance Company no further evi-

dence would be necessary; conversely, should the Court accept the theory of the trustee then hearing would be necessary to determine what would be a proper fee.

Conclusions of Law.

The case relied upon by National Acceptance Company to establish its position in this matter is Security Mortgage Company v. Powers, 278 U. S. 149; 73 L. Ed. 236 (1928).

The Court disagrees with counsel's interpretation of the holding of the Security Mortgage case, in that Mr. Justice Brandeis, "in his usual incisive and lucid manner," discussed only the point presented to the Court for determination in that case. That was whether attorney's fees should be awarded at all, regardless of whether the attorney's services were rendered before or after adjudication, and it further established that the allowability of such a claim (i.e. the validity of the attorney's fee provision), must be determined by the law of the state.

However, assuming an attorney's fee provision is valid under the law of the state, the Bankruptcy Court must determine whether the claim is enforceable in the bankruptcy proceedings. This, as is pointed out by the attorney for the trustee, is determined by the working of the instrument for the claim to be enforceable in the Bankruptcy Court. The provision must be broad enough to include the specific services ren-

dered. In the opinion of this Court, the claim for attorney's fees here is enforceable and the provisions in the contract are sufficient to include the specific services rendered.

The specific question to which we must address ourselves is the issue of what method we should employ to arrive at attorneys fees. The Security Mortgage decision established the enforceability in general of an attorney's fee provision, and it is stated that the allowability of these fees must be determined by the law of the state. However, there is no language in the Security Mortgage decision which would bind this Court concerning the amount of attorney's fees to be allowed. Collier on Bankruptcy, Vol. 3, Para. 63.15, Pg. 1850, Note 16.

The Fifth Circuit Court of Appeals stated in the case of Arnold vs. Phillips, 117 F.2d 497, 500, 501, (1941), the following observations relating to the equity powers of the Bankruptcy Court:

"We are of the opinion that in a bankruptcy case the ownership of property depends ordinarily on the State law, and so does the existence of a debt and the validity of the security for it. The inquiry begins in State law, but does not end there. Whether when bankruptcy supervenes a title acquired by one creditor is good against other creditors, and what are the relative rights and standing of creditors as against each other, and what the propriety of recognizing and enforcing secured debts under varying circum-

stances, are questions so related to the bankruptcy power as to be regulable by Congress; they are of the essence of bankruptcy law. There necessarily arises also a body of judicial interpretation having the effect of law, which overrides the interpretations of the State Courts on similar questions. The 'equity' administered in the bankruptcy Courts may not be exactly that of the State Courts."

This issue of attorney's fees, no less than any other issue, addresses itself to a great degree of the equity jurisdiction of this Court. In view of the object of bankruptcy liquidation to secure an equality of distribution and of the equity powers lodged in the Court for the purpose of easier achievement of this end, the rule that the Bankruptcy Court has the right to determine what constitutes a reasonable fee has much to commend it, even though neither local law nor the Federal statute may specifically confer such authority to the Court. If an equitable result is to be reached, the Court must determine what constitutes a reasonable fee under the circumstances.

State laws, it is true, have their place in regard to the administration of the Bankruptcy Act, but any state statute that is destructive of the purpose and spirit of the Bankruptcy Act should not be adhered to. The Supreme Court rejected a state decision which did this in the case of Local Loan Co. vs. Hunt, 292 U. S. 34, 78 L. Ed. 1230. Local rules subversive of the Bankruptcy Act simply cannot be accepted as controlling the action of the federal Court.

Georgia Code Section 20-506c is important here and may be controlling to a great extent on the question presented, i.e., if equitable considerations were not present. Certain statutory requirements are set out in this Code Section, which National Acceptance Company contends must be complied with in order for a fee stipulation to be valid. These are:

1. Written notice by the holder,

2. To the maker, indorser or person sought to be held,

3. Advising the holder's intent to enforce the attorney's fee provision; and

4. Advising the maker, indorser, or party sought to be held that he has 10 days to pay the obligation without being liable for attorney's fees.

In the case at bar, notice was given by the attorney for National Acceptance Company that the bankrupt companies had ten days to pay the obligations on these notes without being liable for atrorney's fees. However, after five days from the date of giving such notice, bankruptcy proceedings were filed in these cases. The interruption of this ten day notice period by the filing of these bankruptcy proceedings changed the problem of the attaching of attorney's fees completely. The ten day period never in fact ran, and the bankrupt companies certainly could not dispose of any assets or prefer any creditor once the

jurisdiction of this Court attached. Even though National Acceptance Company took every step that they could legally take to protect their rights to attorney's fees, nevertheless, in my opinion, the intervention of bankruptcy placed the matter in a different light. No new notice was given to the receiver or to the trustee who was at that time the only person with whom the creditors could do business. Therefore, even if we employed the Georgia law, as stated in Section 20.506, as the attorney for National Acceptance Company contends that we must do, still the failure of National Acceptance to come totally within the provisions of this Code Section precludes the right to prevail in this instance.

The case of Strickland vs. Williams, 215 Ga. 175 (1959) and Adair Realty and Loan Company vs. Williams Bros. Lumber Co., Case No. 41332, ... Ga. App. ..... (1965), are cases which touch on the problem presented here, and the latter case gives some information concerning the relationship between state receivership proceedings and bankruptcy proceedings.

Even if we look at the National Acceptance Company's instruments, we notice the terminology "such reasonable attorney's fees." None of these instruments contains a percentage provision. The wording in both of them limits the recovery to "such fees" as the holder incurs or pays to its attorney. In the opinion of the Court, the addition of the word "reasonable" does not strengthen the claim of National Acceptance Company, inasmuch as "reasonable"

should be read in conjunction with "such fees" incurred or paid.

In conclusion, it seems to be that the Federal Courts are not bound by any stipulated percentage whether they be spelled out in the instrument or whether they be referred to as "reasonable" seeking to enforce the Georgia statutory definition thereof. It would be my view that these percentages would constitute only a maximum that the Court would allow, and that regardless of whether the instrument provided for a fixed percentage or only generally for such fee, it would be the duty of the Court to determine what constitutes a reasonable fee under the circumstances.

A hearing will be set in the near future at which time the Court will hear testimony from counsel herein as to what would constitute a reasonable fee in this case.

It is so Ordered.

This 3 day of November, 1965.

W. H. DRAKE, JR.,
(W. Homer Drake, Jr.),
Referee in Bankruptcy.

Attest: A true copy.

Certified this Jul. 27, 1966.

CLAUDE L. GOZA,
Clerk,
By FORREST L. MARTIN,
(Seal) Deputy Clerk.

APPENDIX B.

Filed Apr. 22, 1966.

(Title Omitted.)

This is a petition for review of an order entered by the Referee in Bankruptcy of this Court on November 3, 1965. The Referee has filed his certificate in accordance with the provisions of the Bankruptcy Act, and this matter is now before the Court.

National Acceptance Company (hereinafter referred to as "N.A.C.") is a secured creditor of the bankrupt under promissory notes and bills of sale to secure debt. Security instruments held by N.A.C. provide for payment of attorneys' fees in the event that such fees are incurred, and further provide that such fees would constitute a lien upon the mortgaged property. The bankrupt defaulted in its payments, and on April 3, 1964, N.A.C. gave notice of intention to demand attorneys' fees, pursuant to the provisions of Georgia Code Section 20-506. On April 8, 1964, these proceedings were instituted, initially under Chapter XI of the Bankruptcy Act.

Georgia Code Section 20-506 provides in pertinent part as follows:

"20-506. Attorney's fees in notes, etc., in addition to interest.—Obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, shall

be valid and enforceable, and collectible as a part of such debt, if such note or other evidence of indebtedness be collected by or through an attorney after maturity, subject to the following provisions:

"....."

"(b) If such note or other evidence of indebtedness provides for the payment of reasonable attorney's fees, without specifying any specific per cent., such provision shall be construed to mean 15 per cent of the first $500 principal and interest owing on such note or other evidence of indebtedness, and 10 per cent. of the amount of principal and interest owing thereon in excess of $500.

"(c) The holder of the note or other evidence of indebtedness, or his attorney at law, shall, after maturity of the obligation, notify in writing the maker, indorser or party sought to be held on said obligation that the provisions relative to payment of attorney's fees in addition to the principal and interest shall be enforced and that such maker, indorser or party sought to be held on said obligation has 10 days from the receipt of such notice to pay the principal and interest without the attorney's fees. If the maker, indorser or party sought to be held on any such obligation shall pay the principal and interest in full before the expiration of such time, then the obligation to pay the attorney's fees shall be void and no Court shall enforce the agreement.

"(d) Obligations to pay attorney's fees contained in security deeds and bills of sale to secure debt shall be subject to provisions of this section where applicable.

The Referee held that N.A.C. was entitled to reasonable attorneys' fees, but concluded that the Bankruptcy Court was authorized to determine the amount of such fees. N.A.C. argues that, under the case of Security Mortgage Company v. Powers, 278 U.S. 149, 73 L.Ed. 236, and Georgia Code Section 20-506, the Referee was bound to enforce the claim of N.A.C. for attorneys' fees in the amount set forth in Georgia Code Section 20-506.

The trustee contends that N.A.C. failed to comply with the provisions of Georgia Code Section 20-506 and is not entitled to attorneys' fees, and further argues that, should this Court find compliance with the statute, the Referee was correct in concluding that the amount of the fee to be allowed is to be determined by the Bankruptcy Court.

Under Security Mortgage Company v. Powers, supra, the validity of N.A.C.'s claim for attorneys' fees is to be determined under Georgia law, and it appears to this Court that N.A.C. is entitled to attorneys' fees. Under the circumstances of this case, it is apparent that the receiver had notice of N.A.C.'s demand. Notice was given to the president of the bankrupt prior to the institution of these proceedings, and subsequent thereto, the receiver was pres-

ent at a hearing where notice of N.A.C.'s intention to claim attorneys' fees was presented to the Bankruptcy Court. Under Security, supra, it was observed that the prescribed period could run after institution of the bankruptcy proceedings. It thus appears that N.A.C. has complied with the statute, and that its claim for attorneys' fees is valid.

For reasons hereinafter set forth, it is unnecessary to determine whether the language of the instruments relied upon by N.A.C. is within the purview of Georgia Code Section 20-506, so as to require a construction of the phrase "reasonable attorneys' fees" as meaning ". . . 15 per cent. of the first $500 principal and interest owing on such note or other evidence of indebtedness, and 10 per cent. of the amount of principal and interest owing thereon in excess of $500."

N.A.C.'s claim to attorneys' fees in the amount provided by Georgia Code Section 20-506 is founded entirely upon the language of Security Mortgage Company v. Powers, supra. Its contention that cases contrary to its position in this regard were overruled by Security, supra, must fail in the light of the uniform rulings of the Courts subsequent to the Security, supra, decision, that under the circumstances as are here presented, it is for the Bankruptcy Court to determine the amount of the fee to be allowed. Webster Drilling Co. v. Walker, 10 Cir. (1961), 286 F. 2d 114; In re Gotham Can Co., 2 Cir. (1931), 48 F. 2d 540; In re Wellborn, 80 F. Supp. 552; In Re Pack-It, Inc., 158 F. Supp. 148. Cf. In Re Ebert, 140 F. Supp. 597. See also Collier on Bankruptcy, Vol. 3, ¶63.15, Pages 1850, 1854.

For the foregoing reasons, the conclusion of the Referee that the petitioner is entitled to reasonable attorneys' fees in an amount to be determined by the Bankruptcy Court was correct, and the Referee's order of November 3, 1965, is hereby affirmed.

It is so Ordered.

This the 20th day of April, 1966.

LEWIS R. MORGAN,
(Lewis R. Morgan),
United States District
Judge.

Attest: A true copy.

Certified this Jul. 27, 1966.

CLAUDE L. GOZA,
Clerk,
By FORREST L. MARTIN,
Deputy Clerk.

(Seal)

APPENDIX C.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24030

NATIONAL ACCEPTANCE COMPANY,
Appellant,

versus

SAMUEL J. ZUSMANN, SR., Trustee in Bankruptcy for WALTER R. THOMAS, ATHENS, INC., ET AL., Bankrupt,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

(June 23, 1967.)

Before COLEMAN and AINSWORTH, Circuit Judges, and CARSWELL, District Judge.

COLEMAN, Circuit Judge: On review, the District Court affirmed the holding of the Referee in Bankruptcy that the Referee in his sound discretion, and not the law of Georgia, should determine the amount of attorney's fees due a secured creditor of a bankrupt estate. We reverse.

The National Acceptance Company, hereinafter referred to as N.A.C., is a Georgia corporation. The

bankrupts, hereinafter referred to as Thomas, were likewise Georgia corporations. It has been stipulated that the problem here to be decided applies to each and all of them alike. In 1963, Thomas entered into an accounts receivable financing agreement with N.A.C., and executed promissory notes accordingly. N.A.C. then and thereafter lent money to Thomas. On January 22, 1964, Thomas executed a "Chattel Mortgage Security Agreement" in favor of N.A.C. The notes and the chattel mortgage provided for the payment of attorney's fees and further provided that such fees would constitute a lien on the mortgaged property. By April 3, 1964, Thomas had defaulted in its obligations. On that date, N.A.C. gave Thomas written notice of default and declared its intention to collect attorney's fees as provided in the written evidences of debt, and as further provided by *Georgia Code Annotated* § 20-506 (1933, as amended 1957).[1] On April

[1] 20-506. (4252). Attorney's fees in notes, etc., in addition to interest.—Obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, shall be valid and enforceable, and collectible as a part of such debt, if such note or other evidence of indebtedness be collected by or through an attorney after maturity, subject to the following provisions:

(a) If such note or other evidence of indebtedness provides for attorney's fees in some specific per cent of the principal and interest owing thereon, such provision and obligation shall be valid and enforceable up to but not in excess of 15 per cent of the principal and interest owing on said note or other evidence of indebtedness.

(b) If such note or other evidence of indebtedness provides for the payment of reasonable attorney's fees, without specifying any specific per cent, such provision shall be construed to mean 15 per cent of the first $500 principal and interest owing on such note or other evidence of indebtedness, and 10 per cent of the amount of principal and interest owing thereon in excess of $500.

(c) The holder of the note or other evidence of indebtedness, or his attorney at law, shall, after maturity of the obligation, notify in writing the maker, indorser or party sought to be held

6, N.A.C. took possession of the property described in the security instrument and instituted foreclosure proceedings.

On April 8, 1964, Thomas began arrangement proceedings under Chapter XI of the Bankruptcy Act. Adjudication followed.

The Referee held that the notice of default and intention to collect attorney's fees did not put the trustee on notice in compliance with § 20-506(c), *Georgia Code Annotated* (see Footnote 1). The District Court reversed on this point and was clearly right in so doing, *Security Mortgage Co. v. Powers*, 1928, 278 U.S. 149, 49 S. Ct. 84, 73 L. Ed. 236. As to this there is no cross appeal.

The sole issue, then, is whether the Referee, as he held, had the authority to fix the amount of the fees independently of the provisions of the Georgia statutes.

By stipulation of the parties, the notes and chattel mortgage were not fully copied into the record. We have before us only the following excerpts from these instruments:

---

on said obligation that the provisions relative to payment of attorney's fees in addition to the principal and interest shall be enforced and that such maker, indorser or party sought to be held on said obligation has 10 days from the receipt of such notice to pay the principal and interest without the attorney's fees. If the maker, indorser or party sought to be held on any such obligation shall pay the principal and interest in full before the expiration of such time, then the obligation to pay the attorney's fees shall be void and no court shall enforce the agreement.

(d) Obligations to pay attorney's fees contained in security deeds and bills of sale to secure debt shall be subject to provisions of this section where applicable.

NOTE

> . . . . if the holder hereof shall incur or pay . . . any attorney's fees . . . *such* attorney's fees . . . shall be and is hereby made a further charge and lien upon the collateral pledged hereunder. (Emphasis added)

SECURITY AGREEMENT

> . . . if Mortgagee shall incur or pay any . . . attorney's fees . . . *such reasonable* attorney's fees . . . shall be and is hereby made a further charge and lien upon the mortgaged property. (Emphasis added)

An examination of § 20-506 of the Georgia Code reveals that obligations to pay attorney's fees upon any note *or other evidence of indebtedness* shall be valid and enforceable *as a part of the debt* if such note or other evidence of indebtedness be collected by or through an attorney after maturity (emphasis added). The statute further directs that if the note or other evidence of indebtedness provides for the payment of reasonable attorney's fees, without specifying any specific per cent, such provision shall be construed to mean 15% of the first $500 principal and interest owing on such note or other evidence of indebtedness and 10% of the amount of principal and interest owing thereon in excess of $500.

There is nothing ambiguous or abstruse about these provisions. The parties were all residents of Georgia;

they were charged with notice of the statute. In the note or in the chattel mortgage, or both, they could have contracted for a specific attorney's fee as provided by § 20-506(a). This they did not do. The word "reasonable" does not appear in the note, but it does appear in the security agreement, one of the evidences of the indebtedness owed to N.A.C. We are not to suppose that Thomas would have agreed to pay an unreasonable fee or that N.A.C. would have accepted anything less than reasonable. The mortgage used the term "reasonable". It is too plain for cavil, we think, that if the attorney's fees were actually incurred or paid, then the debtor bound himself to pay as provided by § 20-506(b).

Nevertheless, the trustee asserted before the Referee and continues to insist here that the Referee could ignore the statute and had the authority to determine the amount of attorney's fees to be allowed.

The Referee held, and the District Court agreed:

> "The specific question to which we must address ourselves is the issue of what method we should employ to arrive at attorney's fees. The *Security Mortgage* decision established the enforceability in general of an attorney's fee provision, and it is stated that the allowability of these fees must be determined by the law of the state. However, there is no language in the *Security Mortgage* decision

which would bind this Court concerning the amount of attorney's fees to be allowed."

* * *

"In conclusion, it seems to me that the Federal Courts are not bound by any stipulated percentage whether they be spelled out in the instrument or whether they be referred to as 'reasonable,' seeking to enforce the Georgia statutory definition thereof. It would be my view that these percentages would constitute only a maximum that the Court would allow, and that regardless of whether the instrument provided for a fixed percentage or only generally for such fee, it would be the duty of the Court to determine what constitutes a reasonable fee under the circumstances."

Interestingly enough, *Security Mortgage Company v. Powers, supra,* dealt with a Georgia situation. The Florida Furniture Company was adjudicated bankrupt in the Southern District of Florida. Among its assets was real estate in Georgia, acquired by purchase from the Hanson Motor Company. The property was subject to a loan deed given to secure notes of the Motor Company. An ancillary receiver appointed in the Northern District of Georgia took possession of the Georgia real estate. The Security Mortgage Company was the holder of the Hanson notes. The notes provided for a specific sum, 10%, as attorney's fees, if collected by law or through an attorney at law. It is not necessary that we should here repeat the details of the controversy between the trustee and the mortgage company.

Suffice it to say, in an unanimous opinion, written by Mr. Justice Brandeis, the Supreme Court held that "The validity of the lien claimed by the mortgage company for attorney's fees must be determined by the law of Georgia; for the contract was there made and was secured by real estate there situate . . . . The construction of the contract for attorney's fees presents, likewise, a question of local law."

The Supreme Court recognized that the attorney's fees were a part of the principal debt, secured by a lien upon the property given as security, that the lien became perfect when the principal note and the loan deed securing it were given, and that the secured obligation survived bankruptcy.

In obedience to the views of the Supreme Court that the lien for attorney's fees was perfected upon the execution and delivery of the evidences of indebtedness, that the validity of that lien is to be determined by the law of Georgia, and that the construction of the contract as to attorney's fees is likewise a question of Georgia law, we cannot agree in this case that the Referee has the authority to disregard § 20-506 and to reduce the secured indebtedness, the amount of which the parties fixed for themselves under the provisions of the Georgia statute.

The judgment of the District Court will be reversed and attorney's fees will be allowed as directed by § 20-506(b) of the Georgia Code.

REVERSED, with directions.

United States Court of Appeals
For the Fifth Circuit
October Term, 1966

No. 24030.

D. C. Docket No. Bk 48380, 81, 82, 83 & 84

NATIONAL ACCEPTANCE COMPANY,
Appellant,

versus

SAMUEL J. ZUSMANN, SR., Trustee in Bankruptcy for WALTER R. THOMAS, ATHENS, INC., ET AL, Bankrupt,

Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before COLEMAN and AINSWORTH, Circuit Judges, and CARSWELL, District Judge.

JUDGMENT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby, reversed, with directions, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, Samuel J. Zusmann, Sr., Trustee in Bankruptcy for Walter R. Thomas, Athens, Inc., and others, Bankrupt, be condemned to pay the costs of this cause in this Court, in solido, for which execution may be issued out of the said District Court.

June 23, 1967.

Court Costs:

Docketing cause, etc.	$25.00
Cost of Printing Record	$57.50
Total	$82.50

Issued as Mandate: Jul. 21, 1967.

APPENDIX D.

GA. CODE § 20-506 (4252) ATTORNEY'S FEES IN NOTES, ETC., IN ADDITION TO INTEREST.—

Obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, shall be valid and enforceable, and collectible as a part of such debt, if such note or other evidence of indebtedness be collected by or through an attorney after maturity, subject to the following provisions:

(a) If such note or other evidence of indebtedness provides for attorney's fees in some specific per cent, of the principal and interest owing thereon, such provision and obligation shall be valid and enforceable up to but not in excess of 15 per cent of the principal and interest owing on said note or other evidence of indebtedness.

(b) If such note or other evidence of indebtedness provides for the payment of reasonable attorney's fees, without specifying any specific per cent, such provision shall be construed to mean 15 per cent of the first $500 principal and interest owing on such note or other evidence of indebtedness, and 10 per cent of the amount of principal and interest owing thereon in excess of $500.

(c) The holder of the note or other evidence of indebtedness, or his attorney at law, shall, after ma-

turity of the obligation, notify in writing the maker, indorser or party sought to be held on said obligation that the provisions relative to payment of attorney's fees in addition to the principal and interest shall be enforced and that such maker, indorser or party sought to be held on said obligation has 10 days from the receipt of such notice to pay the principal and interest without the attorney's fees. If the maker, indorser or party sought to be held on any such obligation shall pay the principal and interest in full before the expiration of such time, then the obligation to pay the attorney's fees shall be void and no court shall enforce the agreement.

(d) Obligations to pay attorney's fees contained in security deeds and bills of sale to secure debt shall be subject to provisions of this section where applicable. (Acts 1890-1, p. 221; 1900, p. 53; 1946, pp. 761, 766; 1953, pp. 545, 546; 1957, p. 264.)

§ 28-405. (3252) No preferences; assets, how distributed.

Upon the appointment of a receiver, no creditor shall acquire any preference, by judgment or lien, on any suit or attachment under proceedings commenced after the filing of the petition, and all assignments and mortgages to pay or secure existing debts, made after the filing of said petition, shall be vacated, and the assets be divided pro rata among the creditors, preserving all existing liens. (Acts 1880-1, p. 125.)

CHAPTER II

Courts of Bankruptcy

SECTION TWO (11 U.S.C. § 11)

§ 2. Creation of Courts of Bankruptcy and Their Jurisdiction—The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

* * *

(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

* * *

SUPREME COURT, U. S.

OCT 21 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 642.

SAMUEL J. ZUSMANN, SR., Trustee in Bankruptcy for WALTER R. THOMAS, ATHENS, INC., ET AL., Bankrupts,
Petitioner,

v.

NATIONAL ACCEPTANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

NOLAN B. HARMON,
1944 Bank of Georgia Building,
Atlanta, Georgia 30303,
Counsel for Respondent.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

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SAMUEL J. ZUSMANN, SR., Trustee in Bankruptcy for WALTER R. THOMAS, ATHENS, INC., ET AL., Bankrupts,
Petitioner,

v.

NATIONAL ACCEPTANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent, National Acceptance Company (hereinafter sometimes referred to as "NAC"), wishes to reply in opposition to the petition for writ of certiorari in the above-entitled action in regard to the questions presented, statement of the case and argument presented by the petitioner (hereinafter sometimes referred to as "the Trustee").

QUESTION PRESENTED.

On this petition for a writ of certiorari, the only question presented to this Court is whether there is a sufficient basis under Rule 19 of the Rules of the Supreme Court of the United States to grant certiorari to a court of appeals on the following issue and under the following circumstances: When a debtor is obligated to a secured creditor to pay attorney's fees pursuant to written instruments, in a later bankruptcy is the amount of such attorney's fees to be determined pursuant to state law or is the amount discretionary with the bankruptcy court regardless of state law, where this Court held that state law should be followed in **Security Mortgage Company v. Powers**, 278 U. S. 149, 49 S. Ct. 84, 73 L. Ed. 236 (1928), and all the courts of appeals in which the question has been raised since **Security Mortgage v. Powers**, *supra*, have decided uniformly in favor of following state law, including the court below.

The other questions raised by the Trustee are not appropriate for consideration by this Court for reasons discussed below.

STATEMENT OF THE CASE.

The parties to this case entered into a short stipulation of facts for consideration of the United States Court of Appeals for the Fifth Circuit which sets out fully the facts prior to adjudication by the Referee below (R. 14-20). The Court is respectfully directed to that stipulation, which, for purposes of this petition, essentially states that: NAC obtained valid and perfected liens and security interests in the property of the debtor in 1963; NAC notified the debtor on April 3, 1964, that it was in default, and gave debtor notice of intention to collect attorney's fees pursuant to Section 20-506 of the Code of Georgia of 1933, as amended; proceedings under Chapter XI of the Bankruptcy Act were filed on April 8, 1964, and the receiver appointed was shown at a hearing on April 11, 1964, the written demand of April 3, 1964; the debtor was adjudicated a bankrupt on May 11, 1964.

The parties have settled all claims between themselves except the amount of attorney's fees to which NAC is entitled under the facts stated above: NAC contended that it was entitled to "reasonable attorney's fees" as defined in Section 20-506 of the Georgia Code and the Trustee contended that NAC was entitled to only such reasonable attorney's fees, if any, as determined by the Referee. The Referee held that the amount of attorney's fees would be such amount as he deemed reasonable, and that he was not bound by the Georgia statute (R. 1) and on petition for review was upheld by the District Court (R. 9). These judgments were reversed by the Court of Appeals on the ground that both the allowability and amount of attorney's fees were matters governed by state law (Pet. for Cert. App. C).

The other matters discussed by petitioner in his "Statement of the Case" are either unsupported by the Record or irrelevant to the present position, and should be disregarded.

ARGUMENT.

I. The Petition Should Be Denied Due to the Unanimity of All of the Courts of Appeal Which Have Applied This Court's Decision in Security Mortgage Company v. Powers, Holding, as the Court Below Did, That State Law Controls the Bankruptcy Court's Interpretation of Written Attorneys' Fees Provisions.

The question presented,[1] as previously stated, is concerned with whether state law is controlling as to the amount of attorney's fees which is recoverable by a secured creditor against a bankrupt, based upon written instruments providing for the payment of attorney's fees, or whether the Referee in Bankruptcy can disregard state law and determine the amount of attorney's fees to be awarded in his discretion.

Respondent has asserted, and the Court of Appeals held in this case, that the question was determined by this Court in **Security Mortgage Company v. Powers**, 278 U. S. 149, 49 S. Ct. 84, 73 L. Ed. 236 (1928). In the **Security Mortgage** case, this Court construed the predecessor of the very statute of the State of Georgia now in

[1] Aside from the question presented on the merits, Petitioner has not stated a basis for this Court's jurisdiction on certiorari. It can be seen that the statute cited, 11 U. S. C., § 47 (c), merely gives this Court "jurisdiction to review judgments in accordance with the provisions of the laws of the United States," and anticipates the application of a "provision" of a "law of the United States" giving the right to appeal, apply for certiorari or other mode of review. See 2 Collier, **Bankruptcy**, ¶ 24.44 (14th Ed. 1966). Petitioner is applying for certiorari, but there is no language in 11 U. S. C., § 47 (c) which establishes such a right **in this particular case**, and such an incomplete jurisdictional statement should be viewed by the Court as a "failure . . . to present with accuracy . . . whatever is essential to a ready and adequate understanding of the points requiring consideration" and therefore "a sufficient reason for denying his petition." Rule 23 (4), Rules of the Supreme Court of the United States.

question, and determined its applicability in bankruptcy, where a written instrument of indebtedness providing for recovery of attorney's fees was involved. The Court there said that the validity of the lien must be determined by Georgia law. Further,

> The construction of the contract for attorney's fees presents, likewise, a question of local law (citations omitted). Whether the liability is, under the circumstances, enforceable against the proceeds of the sale raises Federal questions peculiar to the law of bankruptcy. The character of the obligation to pay attorney's fees presents no obstacle to enforcing it in bankruptcy. . . . 278 U. S. at 154, 73 L. Ed. at 240.

After deciding to remand the case for decision of issues not here relevant,[2] this Court said

> If the District Court finds that neither of said objections is so sustained, credit for the attorney's fees **shall be allowed for the amount due and secured by the lien,** in conformity with this opinion. 278 U. S. at 159, 73 L. Ed. at 243 (Emphasis supplied).

Since the **Security Mortgage** case, every Court of Appeals which has passed upon the question presented here has followed state law in determining the amount of attorney's fees to be awarded to the secured creditor in the Bankruptcy Court.

A tabulation of cases by circuit follows:

Second—

In re International Raw Material Corp., 22 F. 2d 920, 923 (2d Cir. 1927);

In re Kashmir Refinishing Co., Inc., 94 F. 2d 652, 654 (2d Cir. 1938);

---

[2] That the suit was brought solely for the purpose of enhancing the amount of the debt and that the Trustee had no notice of the creditor's intention to collect attorney's fees.

In re American Motor Products Corp., 98 F. 2d 774, 775 (2d Cir. 1938);

In re Essential Industries Corp., 150 F. 2d 326, 328 (2d Cir. 1945).

Fourth—

Tawney v. Clemson, 81 F. 2d 300, 302 (4th Cir. 1936).

Fifth—

People's Homestead Assn. v. Bartlette, 33 F. 2d 561, 562 (5th Cir. 1929) and the judgment of the court below.

Tenth—

Webster Drilling Co. v. Barth P. Walker, 286 F. 2d 114, 117 (10th Cir. 1961).

See also 3 Collier, **Bankruptcy**, ¶ 63.15 at 1846 (14th Ed. 1966) and 6 Remington, **Bankruptcy**, § 2605.1 at 123 (5th Ed. 1965).

As Judge Ainsworth pointed out during oral argument of this case in the Fifth Circuit Court of Appeals "Why should every other provision of a contract be construed according to state law, but not attorney's fees?" Thus the question has been decided by this Court, and the courts of appeal are in accord with the court below as to the law, and it is respectfully submitted that there is no basis at all for granting a writ of certiorari in this case.

II. The Other Issues Raised by Petitioner Are Not Appropriate for Consideration on Petition for Certiorari.

Respondent hesitates to lengthen its responses unduly by replying to arguments which the Court will doubtless dismiss out of hand, but wishes to respond generally to additional issues raised in petitioner's "Questions Pre-

sented" and "Reasons for Granting the Writ," and discussed in his "Statement of the Case."

The arguments of petitioner regarding inequitable results due to application of a fixed percentage to arrive at the amount of attorney's fees (points 1, 2, 3 and 5) has been considered by one of the cases previously cited, **In re American Motor Products Corp.**, 98 F. 2d 774, 775 (2d Cir. 1938), and further this Court has affirmed the enforcement of attorney's fees clauses without regard to equitable principles where the contract is valid under state law. **Manufacturers' Finance Co. v. McKey**, 294 U. S. 442, 453, 79 L. Ed. 982, 988, 55 S. Ct. 444 (1935). Thus points 1, 2, 3 and 5 of petitioner's "Reasons" must fail.

The question of whether NAC complied with all of the procedural statutory requirements under Section 20-506 (point 8) cannot be raised by the Trustee at this stage for, as the Court of Appeals pointed out, the District Court held that there had been sufficient compliance with the statute and "as to this there is no cross appeal" by the Trustee (Pet. for Cert., App. C, p. 28). "Only in exceptional cases will this Court review a question not raised in the court below." **Lawn v. United States**, 355 U. S. 339, 362, n. 16, 78 S. Ct. 311, 2 L. Ed. 2d 321, 337 (1955). This disposes of point 8 of petitioner's reasons, but respondent must also add that the case of **Strickland v. Williams**, 215 Ga. 175, 109 S. E. 2d 761 (1959), specifically distinguished **Security Mortgage** as a bankruptcy case having no relation to the State receivership proceedings involved there. 215 Ga. at 179, 109 S. E. 2d at 764 (1959).

Points 4 (that the court below misinterpreted **Security Mortgage**) and 7 (that the Courts of Appeal have reached conflicting results) have been discussed in the previous argument, where it was shown that the Court of Appeals

did not misinterpret **Security Mortgage Company v. Powers**, 278 U. S. 149, 49 S. Ct. 84, 74 L. Ed. 236 (1928), which decided the very question now being raised, and further that the holding of the Court of Appeals was in accord with the uniform holdings of other circuits since **Security Mortgage**. This holding is also in accord with two of the three cases cited by petitioner at pages 9 and 10 of his brief, which follow state law in determining the allowability and amount of attorney's fees in bankruptcy. In other words, petitioner has correctly stated the holdings in the three cases, but in **McCabe v. Patton**, 174 Fed. 217 (3rd Cir. 1909), and **Webster Drilling Co. v. Barth P. Walker, Inc.**, 286 F. 2d 114, 117 (10th Cir. 1961), the holding is based upon the law of the state in which the contract was made or the land subject to mortgage situated, respectively. Only in **Mechanics American National Bank v. Coleman**, 204 Fed. 24 (8th Cir. 1913), did a court refuse to follow state law, but it will be noted that this decision was rendered prior to **Security Mortgage**.

Thus there is no decision of any Court of Appeals since the decision in **Security Mortgage Company v. Powers**, *supra*, which is inconsistent with the judgment of the court below.

CONCLUSION.

For the reasons above stated, the petition for certiorari should be denied.

Respectfully submitted,

NOLAN B. HARMON,
Counsel for Respondent.

Certificate of Service.

I, Nolan B. Harmon, of counsel for respondent in the above entitled action, hereby certify that on the 20th

day of October, 1967, I served the foregoing brief for respondent in opposition upon Morris W. Macey, counsel for petitioner, 64 Pryor Street, N. E., Atlanta, Georgia 30303, by depositing a copy in the United States mail, with sufficient postage thereon.

.....

Nolan B. Harmon,
Counsel for Respondent.